

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Abdul Qadir.

BALWANT SINGH—(DEFENDANT)—*Appellant*,

1921

versus

June 14.

BALDEV SINGH AND OTHERS— (PLAINTIFFS)— AND NAND LAL—(DEFENDANT),	}	<i>Respondents.</i>
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Civil Appeal No. 2983 of 1917.

Second Appeal—finding of fact arrived at on consideration of evidence not admissible.

The Lower Appellate Court in considering the question whether plaintiff had proved that he was a minor when he executed a certain mortgage referred to a judgment which was not admissible in evidence but which he considered could not be wholly ignored in a subsequent case in which plaintiff's age was in issue.

Held, that a finding of fact arrived at on consideration of evidence which is inadmissible and which proceeds partly on such evidence can be assailed in second appeal.

Mussamat Sumitra Kuer v. Ram Kair (1), followed.

Second appeal from the decree of W. deM. Malan, Esquire, District Judge, Gurdaspur at Dalhousie, dated the 3rd July 1917, modifying that of Lala Ganesh Das, Subordinate Judge, 1st Class, Gurdaspur, dated the 23rd April 1917, decreeing the claim.

TEK CHAND, for Appellant.

MEHR CHAND MAHAJAN, for Respondents.

The judgment of the Court was delivered by—

BROADWAY, J.—One Narotam Singh claiming to be a minor and acting under the guardianship of his next friend Kirpa Ram instituted a suit on the 27th of July 1916 against Balwant Singh and Nand Lal claiming possession of 116 kanals 5 marlas of

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land which he (Narotam Singh) had mortgaged to Balwant Singh for a sum of Rs. 1,000 on the 13th February 1915. The plaintiff alleged that at the time when the mortgage was executed he was a minor, a fact that was known to Balwant Singh, mortgagee—and that therefore, the mortgage being void, he is entitled to possession. Nand Lal was impleaded as having held the land in suit under a mortgage executed previously by Narotam Singh's father, Ghasitu. Balwant Singh denied that the plaintiff was a minor or that he had knowledge of that fact and claimed the transaction between him and the plaintiff to be a genuine and *bonâ fide* one. The trial Court came to the conclusion that the plaintiff was a minor when the transaction was entered into. It also came to the conclusion that the plaintiff had not been guilty of any misrepresentation, and that he had been a tool in the hands of two persons, namely, Lakhmi Das and Thakar Das. The suit was decreed, although Balwant Singh was held to be entitled to keep possession of the land in suit on the same terms as the previous mortgagee Nand Lal had held.

Against this decree Balwant Singh preferred an appeal to the District Judge. That officer, after briefly stating the facts as above indicated, proceeded to note in his judgment the various arguments advanced by the counsel on each side. Dealing first with the question of minority he came to the finding that the plaintiff had proved that he was a minor on the date of the execution of the mortgage in suit. In arriving at this finding he referred to a judgment passed by Mr. Martineau in Civil Appeal No. 635 of 1913. It had been contended that this judgment was not admissible in evidence not having been passed in a suit *inter parties*. With regard to this judgment the learned District Judge wrote as follows :—

“ Mr. Martineau's judgment in Civil Appeal No. 635 of 1913 may not be strictly admissible in evidence in the present case, but the fact that a judicial officer of Mr. Martineau's experience saw the plaintiff on 10th July 1914 and thought him to be only 15 years old cannot be altogether ignored in a subsequent case in which plaintiff's age is in issue.”

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He then proceeded to refer to the fact that the medical evidence was conflicting, but thought that if any of it was to be accepted, it was clear that that given by Colonel James was entitled to most weight. Colonel James had expressed his opinion that the plaintiff, on the 7th of December 1916, was about 19 years of age. Mr. Tek Chand for Balwant Singh has contended that although a decision on the question of the plaintiff's minority is a decision on a question of fact, nevertheless it can be examined in second appeal, inasmuch as reliance has been placed on evidence that is inadmissible. In our opinion this contention is sound. It is impossible for us sitting as a Court of second appeal to go into the evidence and it is perfectly clear that the learned District Judge must have been, and was, actually influenced by this judgment of Mr. Martineau which the District Judge himself admitted was not "strictly admissible," and the fact that he found that Mr. Martineau's opinion on the question of the plaintiff's age could not be altogether ignored indicates beyond doubt that the learned District Judge was influenced by this opinion. To what extent he was so influenced it is, of course, very difficult to say. We therefore think that a finding arrived at on consideration of evidence which is inadmissible and which proceeds partly on such evidence can be assailed in second appeal. In this view we are supported by a decision of the Patna High Court reported as *Mussammatt Sumitra Kuer v. Ram Kair* (1).

After dealing with the question as to the plaintiff's minority the learned District Judge proceeded to record the arguments of counsel on the question of the appellant's knowledge of the plaintiff's age and his (the appellant's) participation in the fraud. He then proceeds to dispose of the case by saying that in his—

"opinion the arguments of plaintiff's counsel as indicated above represent the correct view of the case and need not be recapitulated."

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We are unable to hold that this is a correct way of disposing of an appeal. It was necessary for the District Judge to have come to an independent finding and given his own reasons for the findings arrived at. The judgment before us is practically nothing but a recapitulation of the arguments of counsel with a brief indication of the District Judge's opinion with regard to the said arguments. We cannot but regard this judgment as unsatisfactory. It has not dealt with all the grounds of appeal raised before the Lower Appellate Court.

We therefore accept this appeal and setting aside the entire judgment of the learned District Judge, dated 3rd July 1917, remand the case to the Court of the learned District Judge for a re-hearing and a re-decision of the appeal. Costs will follow the event.

Appeal accepted.

Case remanded.
